No. 78-1476

In the Supreme Court of the United States

OCTOBER TERM, 1978

MAX W. LYNCH,

Petitioner,

vs.

INDIANA STATE UNIVERSITY BOARD OF TRUSTEES,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Indiana Court of Appeals for the First District that affirmed the judgment of the Superior Court of Vigo County, Indiana, Division II, is reported at 378 N.E.2d 900; App. 7-A.* The Superior Court's opinion and the order denying Petitioner's Petition for Transfer to the Indiana Supreme Court are not reported but are set forth in the Appendix to the Petition. (App. 1-A and 22-A, respectively)

* References to the Appendix to the Petition shall be "App. .....".

JURISDICTION

The jurisdictional requisites to consider the Petition are set forth therein.

CONSTITUTIONAL PROVISIONS INVOLVED

A. The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

B. The Fourteenth Amendment to the United States Constitution, which makes the First Amendment applicable to the states, provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether certiorari is appropriate to review the decision of the Indiana Court of Appeals which applied the well settled standards mandating religious neutrality by the states and permitting the regulation of religious acts, as opposed to beliefs, in ruling that Petitioner's employment as a public high school teacher was properly terminated by Respondent after Petitioner refused to forbear from reading the Bible aloud in his mathematics class.

STATEMENT OF THE CASE

Material Facts

Until February 15, 1974, Petitioner was employed by Indiana State University as an assistant professor of mathematics in the University Laboratory School in Terre Haute, Indiana. During his employment, Petitioner commenced a practice of reading Bible verses aloud to his mathematics students for several minutes at the beginning of each class. After agreeing in September, 1970, to discontinue his reading of Bible verses, Petitioner informed the University President by letter of September 21, 1973, that he intended to recommence reading aloud from the Bible in his classes. Thereafter, Petitioner was formally notified by the University that his Bible reading violated University policy.

On October 4, 1973, the University Executive Committee met with Petitioner, at which time Petitioner stated his intention to continue to read Bible verses aloud to his classes and confirmed this intention by letter to the University President. On October 15, 1973, Petitioner was informed that a hearing would be held by the Faculty Dismissal Hearing Committee to discuss the Petitioner's termination. Subsequently, on February 1, 1974, that Committee recommended the dismissal of Petitioner from the faculty. On February 15, 1974, Respondent, Indiana State University Board of Trustees, voted to affirm the dismissal of Petitioner from the faculty based upon his refusal to forbear from reading Bible verses aloud to his classes. Petitioner has never claimed that the termination procedure followed by Respondent or Indiana State University was insufficient or improperly conducted.

Proceedings Below

Petitioner filed suit on February 11, 1976, in the Marion County, Indiana, Superior Court for reinstatement and back pay. The cause was later transferred to the Vigo County, Indiana, Superior Court, Division II. That Court rendered summary judgment in favor of Respondent and issued its Findings of Fact and Conclusions of Law on March 30, 1977. (App. 1-A)

Petitioner appealed to the Indiana Court of Appeals, First District. On August 2, 1978, in a unanimous decision, that Court affirmed the judgment of the trial court that Respondent was justified in discharging Petitioner after his refusal to cease his religious activities in the classroom. (App. 7-A)

The Supreme Court of Indiana denied Petitioner's Petition to Transfer on January 12, 1979 in an order in which all justices concurred. (App. 22-A)

ARGUMENT

THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS HAVE NOT BEEN VIOLATED.

A. Petitioner Fails to Present an Appropriate Case for Reviewing the Well-Settled Distinction Between Religious Beliefs and Religious Acts.

The Court of Appeals of Indiana carefully considered the uncontested facts in this case and thoroughly reviewed the controlling decisions of this Court construing the Establishment and Free Exercise Clauses of the First Amendment. Its decision is completely in accord with applicable decisions of this Court.

In its opinion, the Indiana Court expressly and correctly refuted the contention that Respondent's termination of Petitioner's employment constituted an infringement of Petitioner's freedom of religious beliefs. That Court stated:

> "Lynch claims that the termination of his employment as a school teacher by I.S.U. violated the First and Fourteenth Amendments by denying him free exercise of his religious beliefs where such exercise did not violate the rights of others.
>
> "The distinction between the extent of the First Amendment protection afforded religious *acts*, as opposed to *beliefs*, was made by Justice Roberts in the following widely quoted statement from *Cantwell* v. *Connecticut*, [310 U.S. 296 (1940)]:

'The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship . . . On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.* In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. *It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.*' (Emphasis added, 310 U.S. 303-304, 60 S.Ct. 903).

"In the cases of *School District of Abington Township* v. *Schempp* and *Murray* v. *Curlett, supra,* and *Engel* v. *Vitale* (1962), 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, the U.S. Supreme Court held that the Establishment Clause of the First Amendment was violated by schools which engaged in daily Bible readings or prayer recitations, notwithstanding the fact that students who objected to the readings or prayers could be excused from their classrooms during the exercises. A fundamental holding of these and other Establishment Clause cases is the Supreme Court's recognition that the imposition of a limitation

upon an individual's act or exercise of religious expression in a public school is not an infringement upon his right to hold his religious beliefs. The United States Supreme Court's decisions prohibiting regular Bible readings or prayers in schools did not affect the beliefs of the students, teachers and parents, who desired those religious exercises. The Court's decisions merely limited the times and places for conduct expressing those beliefs.

• • •

"To allow Lynch to exercise his freedom to act, here, in reading the Bible aloud to his students would impinge upon his students' freedom to believe as they wish. Under the rule in *Cantwell,* which was reaffirmed in *Torcaso,* the concept of freedom to believe is an absolute right, and the freedom to act, in the nature of things, cannot be absolute. Thus when the exercise of his religious acts impinges upon the rights of his students to believe, then Lynch's rights must fall. A man cannot extend his religious freedom until it infringes upon another person's civil rights or constitutional liberties. The right to worship is not a right to disturb others in their worship.

"Lynch was not discharged from I.S.U.'s employment because of his religious beliefs, but was terminated because of his activities of reading aloud from the Bible before each of his mathematics classes. Lynch was not deprived of his right to read aloud from the Bible before and after school at his home, in church and with friends. The record shows that I.S.U. advised Lynch that he must not consume the limited and valuable classroom time available for teaching mathematics by reading the Bible. This I.S.U. unquestionably had the right to do in order for the University to maintain religious neutrality and promote secular education."

(378 N.E.2d at 904-906; App. 13-A to 16-A)

Scrutiny of the decisions of this Court cited and discussed by Petitioner at pages 4 and 5 of the Petition dis-

close that Petitioner erroneously interprets and misapplies those decisions.

Petitioner relies heavily upon the decision in *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), which he cites for the proposition that public positions cannot be withheld from persons because of religious beliefs. That case involved a Maryland law requiring that each public office holder sign an oath declaring a *belief* in the existence of God. Respondent did not discharge Petitioner for the substance of his beliefs (which notably are not identified in the record and are not relevant hereto), or for his non-belief. Petitioner was discharged by Respondent for his refusal to forbear from the religious *act* of Bible reading in class. Accordingly, Petitioner's reliance upon *Torcaso* is misplaced.

Similarly, *Shelton* v. *Tucker,* 364 U.S. 479 (1960), is not relevant to Petitioner's case. *Shelton* held that an Arkansas statute requiring teachers to disclose to school officials all of their organizational relationships violated the First Amendment's guarantee of freedom of association. It did not involve a state's prohibiting religious conduct by a school teacher during classroom time on a public school's premises. To the contrary, *Shelton* held that Arkansas's concern with each and every activity and association of its public school teachers *outside* of school and during *non-teaching* hours was beyond that state's legitimate concern about those teachers' occupational competence and their activities during school.

Petitioner's reference to *Perry* v. *Sindermann,* 408 U.S. 593 (1972) is also inapposite. That opinion involved First Amendment rights to free speech unrelated to religion, as well as the question of the procedural due process to be afforded to a terminated teacher with *de facto* tenure. *Perry* is clearly distinguishable from the case at bar where Petitioner (i) contends his right to freedom of religious belief has been infringed and (ii) has not challenged the trial court's conclusion that he was provided with the opportunity for a fair and impartial hearing pursuant to University procedures and in compliance with due process guarantees under the United States Constitution. (App. 5-A; 378 N.E.2d at 902, n. 2 and App. 9-A, n. 2)

The facts and issues presented by Petitioner's case are well within the ambit of those considered by this Court in *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963) and *Engel* v. *Vitale,* 370 U.S. 421 (1962). Those opinions delineated the reach of the Establishment Clause and the limitations of the Free Exercise Clause in holding that Bible reading and non-denominational prayers are not permissible in public schools. Those opinions of this Court conclusively support the unanimous rulings in favor of Respondent in all of the proceedings below. Therefore, the granting of certiorari would only result in affirmance of the ruling of the Indiana Court of Appeals.

B. Petitioner Fails to Present an Appropriate Case for Reviewing the Well-Settled Standards for Maintaining Religious Neutrality.

The Establishment Clause of the First Amendment "[e]rected a wall between church and state" which must be kept "high and impregnable". *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947). As Justice Fortas later wrote in *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968), quoted by the Indiana Court of Appeals at 378 N.E.2d 907-908 (App. 20-A):

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or

to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." 393 U.S. at 104, 89 S.Ct. at 270

Petitioner contends that since his students could voluntarily leave the classroom during his Bible reading, there could have been no infringement upon their First Amendment rights. That contention was considered and rejected by the Court of Appeals in accordance with prior conclusions of this Court:

> "Justice Brennan, writing a concurring opinion in *Abington School District* v. *Schempp,* (1963), 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, had the following comments on a provision allowing students to be 'excused' from religious instruction:
>
> > '. . . by requiring what is tantamount in the eyes of the teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request. (374 U.S. at 289-290, 83 S.Ct. at 1607).'
>
> "For students in his mathematics classes, the indisputable effect of Lynch's Bible reading was the advancement or promotion of Lynch's particular religious views and practices. Peer pressure, fear of the

> teacher, concern about grades, and the alternative of standing outside the classroom in the hall, severely limit the freedom of a student to absent himself from class during a Bible reading. Additionally, Lynch's religious activity was being conducted while he was employed by the I.S.U. Board of Trustees, using public facilities, during class time.
>
> "We think that the alternative afforded Lynch's students to absent themselves from the classroom was not sufficient protection to their own constitutional rights in light of the supervisory position of control occupied by the teacher over student grading and conduct, coupled with peer pressure and disapproval which we feel would have a 'chilling' effect at best and more likely, a coercive impact on the student's free exercise of their religious right." (378 N.E.2d at 903; App. 10-A to 11-A)

The Indiana Court of Appeals held on the basis of this Court's decision in *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963), that there was no dispute that Petitioner's daily Bible readings were a religious activity (378 N.E. 2d at 903, n. 3; App. 11-A, n. 3). Consequently, that Court applied the two-pronged test announced in *Abington Township*:

> ". . . The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion . . ." (374 U.S. 203 at 222)

The Indiana Court's proper application of the above-quoted test is apparent from its concluding remarks:

> "The Establishment Clause, then, stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. *Abington School District* v. *Schempp, supra; Gillette* v. *U.S.* (1971), 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168.
>
> "While the State has not directly participated in the act of Bible reading by Lynch, it placed him in the position of authority from which he might express his religious views during a part of the curricular day, involving young people whose presence is compelled by law, hence utilizing the prestige, power, and influence of school authority.
>
> "Thus had I.S.U. permitted Lynch to continue the Bible readings, it would have violated its religious neutrality mandated by the Establishment Clause of the First Amendment, allowed infringement upon the religious freedoms of its students, and failed to promote the secular goal of instruction in mathematics for which Lynch was employed."

(378 N.E.2d at 908; App. 20-A to 21-A)

Respondent unquestionably had the duty, pursuant to the decisions of this Court, to require Petitioner to forbear from his religious activities in order for Respondent to maintain religious neutrality and promote secular education.*

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* Surely, the Respondent's actions to maintain religious neutrality and promote the equal treatment of all students, faculty, and religions by prohibiting Petitioner's Bible reading are distinguishable from the situation in *Fowler* v. *State of Rhode Island,* 345 U.S. 67 (1953), cited by Petitioner at page 4 of the Petition. There, the State of Rhode Island, in violation of the Equal Protection Clause of the Fourteenth Amendment, blatantly denied Jehovah's Witnesses the right to use a public park that was open to all other religious groups.

CONCLUSION

For the foregoing reasons, Respondent submits that the Court of Appeals of Indiana, First District, has decided the constitutional questions raised by Petitioner in complete accord with the applicable decisions of this Court. Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

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